IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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NO. 97 MAP 2003

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COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CIGTEC TOBACCO, LLC,

Appellant

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# BRIEF FOR APPELLEE

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On Appeal from the Order of the Commonwealth Court Dated May 20, 2003 at Docket No. 404 M.D. 2001

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DATED: November 3, 2003

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## STATEMENT OF JURISDICTION

This Court lacks jurisdiction because the Commonwealth Court's order is interlocutory and does not fit into any of the narrow exceptions permitted for interlocutory appeals.

The Commonwealth filed this action in the Commonwealth Court because CigTec Tobacco, LLC (hereafter "CigTec") failed to escrow funds as required by the Tobacco Settlement Agreement Act (hereafter "TSAA"), 35 P.S. §§5671 *et. seq.* Several months after the suit was filed, CigTec finally escrowed funds for its 2000 and 2001. CigTec then petitioned the Commonwealth Court for a partial release of the funds escrowed for its 2001 sales. The court denied the petition without prejudice because CigTec had counterclaimed for the same funds; the court concluded that it could not resolve the question of who was entitled to the funds without determining the issues raised in the Commonwealth's complaint. Accordingly, the Commonwealth Court ruled that all the issues raised by the Commonwealth's case in chief and CigTec's counterclaim are to be resolved at trial. It is this ruling which is currently before this Court.

The general rule governing appealable orders to this Court is Pa.R.A.P. 314, which permits an appeal from a "final order." The purpose of the rule is to avoid piecemeal litigation. A final order is one that disposes of all parties and all claims relating to the action. *In re Estate of Quinn*, 805 A.2d 541 (Pa.Super. 2002). Here, the Commonwealth Court's Order does not dispose of any claims or parties to the underlying action and therefore, is not appealable under Pa.R.A.P. 314.

Any exception to this rule must be narrowly construed so that the exception does not swallow the general rule. *See Geniviva v. Frisk*, 555 Pa. 589, 599, 725 A.2d 1209, 1214 (1999). In its jurisdictional statement CigTec relies on those exceptions found in Pa.R.A.P. 311(a)(2) and Pa.R.A.P. 313(b). Neither of these rules apply.

Rule 311(a)(2) allows an appeal from an order "confirming, modifying, or dissolving or refusing to confirm, modify or dissolve an attachment, custodianship, receivership or similar matter affecting the possession or control of property." By enacting a specific rule governing appeals from these particular actions and remedies, the Court showed its awareness of the distinctions between these proceedings and its desire to treat them differently. *Jerry Davis, Inc. v. Nufab Corp.*, 450 Pa. Super. 696, 702, 677 A.2d 1256, 1259 (1996). Based on this, the courts have been reluctant to permit appeals under this Rule in situations in which property is not actually removed from the possession and control of a party, and placed in the hands of a receiver. *See Rappaport v. Stein*, 360 Pa.Super. 325, 520 A.2d 480 (1987) (order directing a real estate management firm to sell properties in a partnership dissolution does not constitute the removal of control from the owners and is not appealable under Pa.R.A.P. 311(a)); *Rappaport v. Stein*, 351 Pa. Super. 370, 506 A.2d 393 (1985) (order in partnership dissolution case to appoint a firm to manage investment properties was not appealable under Pa. R.A.P. 311(a)).

In the current matter, the Commonwealth Court's order does not remove the property (the escrow funds) from CigTec's possession and control and place them in the hands of a receiver or custodian. Nor does it relate to an attachment proceeding

on a final judgment. Therefore, the appeal does not fall within the literal terms of Rule 311(a)(2).

CigTec attempts to avoid this jurisdictional defect by citing to *Triffin v. Interstate Printing Co., Inc.*, 357 Pa.Super. 240, 515 A.2d 956 (1986), and *Foulke v. Lavelle*, 308 Pa. Super. 131, 454 A.2d 56 (1982), and claiming that its appeal qualifies as a "similar matter" covered under the catch-all provision of Rule 311(a)(2). These cases are clearly distinguishable.

In *Triffin*, the plaintiff had a final judgment against the defendant and sought to execute on it by attaching funds which were being held by a bank through a bankruptcy receivership. The bankruptcy court lifted the automatic stay to enable Triffin to execute on the judgment in state court. When Triffin then filed to attach the funds, the Court of Common Pleas held that the funds were still subject to the bankruptcy stay.

Triffin appealed the order to the Superior Court. The Superior Court noted that although the "attachment" was actually a "garnishment" (because it sought to access the debtor's funds held by a third party and not funds directly held by the debtor), both legal concepts were sufficiently similar to permit appeal. *Triffin*, 357 Pa. Super. at 245, 515 A.2d at 958.

The commonality between an "attachment" and a "garnishment" is that they both relate to specific proceedings to execute on a final judgment, with a difference only in who possesses the property being executed on. CigTec's petition does not relate to executing on a final judgment through attachment or garnishment

proceedings. Therefore, the analysis by the court in *Triffin* is inapplicable to this matter.

The only other case relied upon by CigTec, *Foulke v. Lavelle*, 308 Pa. Super. 131, 454 A.2d 56 (1982), concerned a party trying to execute on a final judgment in state court through a writ of attachment and a writ of execution. Preliminary objections to the writ of attachment were filed, as well as a motion to stay the writ of execution. The basis of the objections, and the motion, was a claim that the funds were part of a bankruptcy estate. The lower court denied the preliminary objections and dismissed the stay.

On appeal, the Superior Court initially discussed whether the lower court order constituted a "final order." The appellate court specifically found that:

> Part (2) of the lower court's order, which denied appellant's motion to set aside or stay the Writ of Attachment, has final aspects since it has the result of "affecting the possession or control of property." It therefore falls within the class of orders which are appealable as or [sic] right under Pa.R.A.P. 311(a)(2).

308 Pa. Super. at 136, 454 A.2d at 58. Therefore, it is clear that the appeal in *Foulke* was directly related to a final order concerning an attachment proceeding.

In the case at bar, the Commonwealth Court's order does not relate to an "attachment" or similar matter affecting the possession or control of property. The property in the current matter is more analogous to an insurance policy. The purpose of the escrow account is to establish a reserve fund to guarantee a source of compensation to the Commonwealth if the tobacco product manufacturer is found liable in the future. 35 P.S. §5672(6).

An interlocutory order relating to the disposition of insurance policy funds is not appealable if it does not dispose of all the parties and all the claims. In *In re Estate of Quinn,* 805 A.2d 541 (Pa. Super. 2002), the decedent died in a car accident. There were three insurance policies involved and two co-administrators to the estate. The lower court approved a settlement to be paid from two of the policies to an attorney retained by one of the co-administrators. The other co-administrator objected to the settlement and appealed the lower court order. *Id.* at 541-542. The appellate court quashed the appeal because the order did not dispose of all the claims or all of the parties. *Id.* at 543. Here, CigTec is asking for a partial release of the escrow funds, which the Commonwealth Court denied as premature. The Commonwealth Court order did not dispose of any of the claims or any of the parties, and, therefore, under *Quinn* is not appealable.

CigTec's reliance on Pa.R.A.P. 313 is equally unavailing. Under Pa.R.A.P. 313, a collateral order is immediately appealable if: (1) it is separable from, and collateral to, the main cause of action, (2) it involves a right too important to be denied review, and, (3) the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost. *Wilson v. Wilson*, 828 A.2d 376, 378 (Pa. Super. 2003). This three prong test is to be narrowly construed to prevent this exception from swallowing the general rule that only final orders are appealable. *Geniviva v. Frisk*, 555 Pa. 589, 598-599, 725 A.2d 1209, 1214 (1999).

CigTec's petition for release (which is identical to its counterclaim) is not separable from the main cause of action. The main cause of action concerns CigTec's failure to timely escrow over $1.2 million for the sale of its cigarettes in Pennsylvania during the years 2000 and 2001. The Commonwealth also seeks an order requiring funding of the full escrow amount for 2002 sales ($1,785,086.15), plus over $3 million in additional statutory penalties.[1] CigTec's petition seeks the release of $248,973.30. Because the Commonwealth is claiming that additional funds are owed, the disputed funds should not be released until the Commonwealth's claim is resolved. Thus, CigTec has not satisfied the first prong of the test.

CigTec has failed to satisfy the second prong of the test as well. CigTec claims that this matter involves "a right too important to be denied review." It does not. CigTec's "important right" is a claim that it needs the funds for business purposes. The "important right" requirement refers to interests deeply rooted in public policy considerations and not the specific interests of a party. *Geniviva v. Frisk*, 555 Pa. 589,599, 725 A.2d 1209, 1214 (1999). The second prong has not been met.

Nor has the third prong of the test been satisfied. Any claim that CigTec may have to any escrowed funds will not be irreparably lost, or even substantially impaired, if a review of the claim is postponed. No party other than the

[1] While the amended complaint for CigTec's failure to escrow for 2002 sales was filed after the hearing on CigTec's petition, the Attorney General's Office told the court that the money had not been paid and that an amended complaint would soon be filed. As of this writing, CigTec has yet to escrow any funds for those sales.

Commonwealth or CigTec has a legally recognizable interest in the escrow funds. The funds may not be withdrawn by either party unilaterally. They are not subject to attachment and cannot be dissipated before a final determination on the merits can be made.

The Commonwealth Court's order is interlocutory and not appealable under Pa.R.A.P. 314. The exceptions under Pa.R.A.P. 311 and Pa. R.A.P. 313 do not apply. This Court should quash the appeal for lack of jurisdiction.

## STATEMENT OF STANDARD AND SCOPE OF REVIEW

The only relevant issue in this appeal is whether the Commonwealth Court was correct in dismissing, without prejudice, CigTec's petition for release of funds (which is the same as CigTec's counterclaim) because intertwining issues between the Commonwealth's case in chief, and CigTec's counterclaim, should be resolved at one time. The Commonwealth Court's decision to keep the case in chief and the counterclaim consolidated is a pre-trial interlocutory order which is reviewable under an abuse of discretion standard. *See Abrams v. Uchitel*, 806 A.2d 1 (Pa. Super. 2002); *Didio v. Philadelphia Asbestos Corp.*, 642 A.2d 1048, 434 Pa. Super. 191 (1994) (the decision to consolidate or sever actions rests within the discretion of the trial court).

The other issues posed were not addressed by the Commonwealth Court.

## ORDER IN QUESTION

**AND NOW**, this 20th day of May, 2003, after argument on whether the Court should grant the petition of Cigtec Tobacco, LLC., to release the excess escrow payment for 2001 made in Pennsylvania under the Tobacco Settlement Agreement Act,

It appearing that Cigtec Tobacco, LLC., has also counterclaimed for the excess moneys paid for 2001 into the escrow fund and that unresolved issues of fact and law raised by the other pleadings are intertwined with issues raised by the petition for release and in the interests of judicial economy,

It is hereby **ORDERED, ADJUDGED** and **DECREED** that the petition for the release of excess escrow payment is dismissed without prejudice and that issues raised by the petition shall be resolved in the trial of the counterclaim asserted by Cigtec Tobacco, LLC., against the Commonwealth of Pennsylvania by the Attorney General, plaintiff in the main case.

## STATEMENT OF QUESTIONS INVOLVED

1. Did the Commonwealth Court commit an abuse of discretion in dismissing CigTec's petition without prejudice, and ruling that the merits of the petition will be addressed at trial during the commonwealth's case in chief and CigTec's counterclaim?

(Suggested answer: No.)

2. Is the issue of the underlying merits of CigTec's petition properly before this court, given that the Commonwealth Court never ruled on this issue?

(Suggested answer: No.)

3. If the Court were to reach the underlying merits of CigTec's petition, should the Court conclude that the petition is meritless?

(Suggested answer: Yes.)

## STATEMENT OF THE CASE

A. Form of Action

This is an action to enforce the Tobacco Settlement Agreement Act of 2000 (hereafter "TSAA"), 35 P.S. §5671, *et. seq.* The purpose of the TSAA is to insure that cigarette manufacturers that do not participate in the Master Settlement Agreement (hereafter "MSA") have sufficient funds to pay a judgment if they are found liable in the future for harm caused by their products. To this end, all non-participating manufacturers (hereafter "NPMs"), such as CigTec, must escrow money by April 15 for the sale of their cigarettes in Pennsylvania the previous year. A manufacturer faces a statutory penalty of up to 300% of the amount not timely escrowed. 35 P.S. §5674. The Commonwealth is seeking over $9 million in statutory penalties against CigTec for failing to timely escrow funds for its 2000, 2001 and 2002 sales. Additionally, the Commonwealth is seeking to require CigTec to escrow $1.7 million for its sales in 2002.

B. Procedural History

On August 1, 2001, the Commonwealth filed suit against CigTec because the company had not timely escrowed funds for its cigarette sales in the year 2000. An amended complaint was filed on September 27, 2002, to include CigTec's failure to timely escrow for its 2001 sales.

On March 17, 2003, CigTec filed a petition for a partial release of the funds escrowed for the 2001 sales. On May 16, 2003, CigTec filed an amended answer to the complaint which contained a counterclaim mirroring its petition.

The Commonwealth Court held a hearing on CigTec's petition on May 20, 2003. That same day, the court ruled that the matter would be resolved at trial. On June 18, 2003, CigTec filed the current appeal. [2]

On August 15, 2003, this Court entered an Order postponing the consideration of jurisdiction to the hearing on the merits pursuant to Pa. R.A.P. Rule 909(c).

C. Prior Determinations

There are no prior judicial determinations concerning this matter.

D. Names of Judges

The name of the judge who issued the order is the Honorable Eunice Ross of the Commonwealth Court of Pennsylvania.

E. Statement of Relevant Facts.

The Commonwealth sued CigTec because it failed to escrow by the statutory deadline over $1.2 million for its cigarette sales in the years 2000 and 2001. See R. 10a-20a. Based on this, the Commonwealth sought a statutory penalty in excess of $3.7 million. See R. 19a para. c.

In March 2003, CigTec filed a petition to release approximately $250,000 of the funds it belatedly escrowed. Relying on 35 P.S. § 5674 (b), CigTec claimed that this sum should be released because it allegedly was the amount in excess of what Pennsylvania would have received if CigTec had joined the MSA. See R.114a. In its

[2] On July 3, 2003, the Commonwealth amended the complaint by adding a claim for CigTec's failure to escrow over $1.7 million for 2002 sales and requesting over $5.3 million in statutory penalties. CigTec has yet to escrow anything for those sales.

opposition to the petition, the Commonwealth stated that the money should not be released because, among other things, CigTec was facing already over $3.6 million in statutory penalties and was going to be required by April 15, 2003, to escrow an additional $1.7 million for its 2002 sales. R. 122a, para. 5.

CigTec did not escrow any of the money it was required to for its 2002 sales. See R. 58a para. 23, 59a para. 25. A month after the April 15 deadline passed, CigTec filed an amended answer to the complaint and a counterclaim mirroring its petition for release of funds. See R. 82a.

On May 20, 2003, the Commonwealth Court dismissed CigTec's petition without prejudice, finding that the right to the funds would be addressed at trial as part of CigTec's counterclaim. See order set out on page 9.

In July, the Commonwealth amended its complaint to compel CigTec to escrow the $1.7 million required for its 2002 sales. See R. 58a-59a. The Commonwealth is seeking statutory penalties in excess of $5.3 million for those sales alone. See R. 65a para. d.

For its failure to properly escrow funds for the sale of its cigarettes in 2000, 2001, and 2002, CigTec is now facing statutory penalties in excess of $9 million. See R. 63a para. b; 65a para. d. CigTec has never claimed it timely escrowed the proper funds under the TSAA for any of its sales in Pennsylvania during the years 2000, 2001, and 2002.

F. Statement of Order Under Review

The Commonwealth Court order under review dismissed the petition without prejudice, noting that CigTec has a pending counterclaim requesting the exact same relief. The petition was premature given that the Commonwealth and CigTec have competing claims for relief under the TSAA. The order maintains the status quo of the escrow account until all matters raised in the pleadings can be resolved at trial.

## SUMMARY OF ARGUMENT

The Commonwealth Court did not abuse its discretion in finding that issues raised in the pleadings are intertwined with CigTec's petition for release of funds. Before releasing any funds from the escrow account, the court should have the opportunity to consider all of the facts relating to the establishment and funding of the account.

The issue raised by CigTec on appeal (whether the underlying petition is meritorious) is not properly before this Court because the Commonwealth Court never addressed the merits of the petition. Any consideration by this Court of the applicability of the TSAA to CigTec's petition is premature given that the Commonwealth Court has never addressed the issue.

Furthermore, a consideration of the merits of CigTec's petition demonstrates that it is meritless. A condition precedent to releasing the funds is that they be escrowed by the April 15 deadline as required under 35 P.S. §5674. CigTec has not fulfilled this condition and therefore is not entitled to a release. CigTec's claim that the requirement to escrow by April 15 is "directory", not mandatory, is frivolous.

The Commonwealth Court did not err in refusing to release any funds from the escrow until trial of the underlying case, and the appeal should be quashed.

## ARGUMENT

### I. Introduction.

In its brief, CigTec immediately addresses the underlying merits of its petition for release of funds. That issue is not properly before this Court. The Commonwealth will address below what the proper issue is on appeal, why the issue raised by CigTec is improper and, why, if the Court were to consider the merits of CigTec's petition, it should be denied.

### II. The Commonwealth Court Did Not Abuse Its Discretion In Denying Cigtec's Petition Without Prejudice And Ruling That The Merits Of The Petition Would Be Addressed At Trial.

The Commonwealth Court never reached the merits of CigTec's petition. Instead, it ruled that because the issues raised by the petition were intertwined with those presented by the Commonwealth's complaint and CigTec's counterclaim they should all be considered at the same time, ie. at trial. Thus, the only issue properly presented by this appeal is whether the Commonwealth Court abused its discretion in deciding that consideration of CigTec's petition should be deferred until trial. It did not.

In its amended complaint, the Commonwealth contends that CigTec should pay statutory penalties in excess of $3.7 million for its TSAA violations concerning 2000 and 2001 sales. The Commonwealth also seeks to require CigTec to place $1.7 million more into the escrow fund, and pay additional statutory penalties in excess of $5.3 million, for its 2002 sales. It is essential that before any funds are released from CigTec's escrow account that it be determined how much money should be in the

account. This question cannot be answered until the Commonwealth's claims are resolved. Hence, the Commonwealth Court reached the only correct conclusion in refusing to piecemeal out the competing claims of the parties.

The Commonwealth Court's order does nothing more than affirm that all issues concerning the parties' claims will be tried at one time and maintains the status quo of the escrow account until there is a final resolution of the suit. The order equates to a refusal to sever the Commonwealth's case-in-chief from CigTec's counterclaim. Such a decision is clearly within the court's discretion. *See Coleman v. Philadelphia Newspapers, Inc.*, 391 Pa. Super. 140, 570 A.2d 552 (1990).

### III. The Commonwealth Court did not address the underlying merits of CigTec's petition, and therefore that issue is not properly before this Court.

It is elementary that the task of an appellate cour is limited to reviewing the decision that is being appealed of the lower courts. *See Warehime v. Warehime*, 761 A.2d 1138 (Pa. 2002) (matter remanded to Superior Court to consider issues raised but which were not addressed below). CigTec ignores this principle by asking this Court to rule on the merits of its petition.

A plain reading of the Commonwealth Court order clearly demonstrates that it never considered the underlying merits of CigTec's petition. Because the Commonwealth Court did not reach the merits of CigTec's petition, it is not necessary, or proper, for this Court to do so.

## IV. Assuming Arguendo That The Underlying Merits Of Cigtec's Petition Are Properly Presented, The Petition Should Be Dismissed.

CigTec's analysis of the TSAA provision relating to escrow release is not only premature but also inherently flawed. Section 5674(b) allows the release of funds from escrow for an NPM that escrows under Subsection 5674(a)(2). This subsection requires an NPM to escrow by April 15 for sales in the previous year. CigTec has never met this deadline and therefore has not satisfied a condition precedent for the release of funds under Section 5674(b).

CigTec tries to sidestep this requirement by claiming that the April 15 deadline is "directory" and not mandatory. This position is frivolous. To adopt this position would totally negate Section 5674(c) of the TSAA, which provides penalties to be calculated for every day the escrow is paid late.

Furthermore, if the deadline is not mandatory, it would eviscerate the entire statute. With no date certain to escrow funds, no NPMs would escrow at all. There is a presumption that the legislature did not intend a result that is absurd or unreasonable. *Commonwealth v. Masters*, 737 A.2d 1229, 1231 (Pa. Super. 1999). CigTec's claim that the April 15 deadline is not mandatory is absurd on its face, and absurd in its application.

CigTec has not met a condition precedent under Section 5674(b) of the TSAA. The underlying petition is meritless.

## CONCLUSION

For the foregoing reasons, the appeal from the Commonwealth Court's order dismissing CigTec's petition without prejudice should be quashed for lack of jurisdiction. Alternatively, the petition should be denied.

Respectfully submitted:

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DATED: November 3, 2003

**IN THE**
**SUPREME COURT OF PENNSYLVANIA**

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| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **by D. MICHAEL FISHER,** | : | |
| **Attorney General,** | : | |
| **Appellee** | : | |
| **v.** | : | **No. 97 MAP 2003** |
| | : | |
| **CIGTEC TOBACCO, LLC.,** | : | |
| **Appellant** | : | |

## CERTIFICATE OF SERVICE

I, Timothy P. Keating, Deputy Attorney General of the Attorney General of Pennsylvania, hereby certify that on November 3, 2003, I caused to be served a copy of the foregoing document entitled Brief for Appellee, by depositing same in the United States Mail, postage prepaid, in Harrisburg, Pennsylvania, upon the following:

Michael Kelley, Esquire
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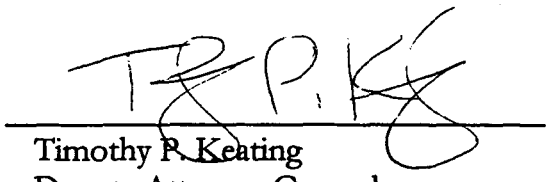
Harrisburg, PA 17101



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